IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA NO.1907 OF 1982
DATE OF DECISION: 18-07-2007

Jagdev Singh and others

.....APPELLANTS

VERSUS

Sucha Singh and others

.....RESPONDENTS

CORAM:- HON'BLE MR.JUSTICE HEMANT GUPTA

PRESENT: Mr.YK Sharma, Advocate
for the appellants.

Mr.Arun Jain, Advocate with
Mr.Amit Jain, Advocate
for the respondents.

HEMANT GUPTA, J.(Oral)

The present appeal by the plaintiff and defendants Nos.6 to 10 is against the judgment and decree passed by the First Appellate Court whereby the appeal filed by the defendants-vendees was accepted and the suit dismissed.

Jagdev Singh-plaintiff son of Hari Singh filed the suit for possession of agriculture land mearusing 18 Bighas 16 Biswas on the ground that the said land was purchased by Bhagwan Kaur his mother for a sum of Rs.30,000/- vide a registered sale deed on 18-8-1972. Bhagwan Kaur died on 16-12-1975, leaving behind the plaintiff, defendants Nos.6 to 10 as her legal heirs and thus entitled to succeed to her property. But, Hari Singh her husband got mutation sanctioned of the entire estate of Bhagwan Kaur in his name on 20-05-1976 and on the basis of the aforesaid mutation

entry, sold land measuring 9 Bighas 3 Biswas vide sale deed dated 21-05-1976 and another parcel of land measuring 9 Bighas 3 Biswas was sold on 24-05-1976 in favour of defendants No.1 to 4. It was thus alleged that sale by Hari Singh in favour of respondents No.1 to 4 is illegal and void as he was not competent to sell the entire share of Bhagwan Kaur.

Defendants No.1 to 4 in their separate written statements claimed themselves to be bonafide purchasers of the suit land for valuable consideration and without notice. Defendant No.5-Hari Singh husband of Bhagwan Kaur stated in his written statement that he is the actual owner of the suit land and that suit land was actually purchased by him in the name of Bhagwan Kaur his wife out of love and affection and that Bhagwan Kaur was only Benami owner. Defendants No.6 and 7, the sons of Hari Singh and Bhagwan Kaur also averred in the written statement that the land in dispute is the real ownership of Hari Singh and that Bhagwan Kaur was only a Benami owner.

The learned trial Court framed the following issues:

"1.Whether Smt. Bhagwan Kaur was owner of the property in dispute? OPP.

2. If issue No.1 is proved, whether the plaintiff has inherited the share of the property, if so, what effect? OPP.

3. Whether Smt. Bhagwan Kaur was Benami owner of the property in dispute, if so, its effect? OPD

4. Whether Hari Singh had no right to sell the property? OPP.

5.Whether there has been any oral arrangement between Hari Singh defendant No.5 and his sons and property in dispute stood fallen to the share of the defendant No.5 as alleged in written statement? OPD.

6. Whether the plaintiff is estopped to file the present suit by act or conduct? OPD.
7. Whether defendants are bonafide purchasers for consideration and without notice? OPD.
8. Whether the plaintiff is entitled to possession of the property in dispute, if so, to what share? OPP.
9. Relief."

The plaintiff appeared as his own witness. None from defendants No.5 to 7 appeared as witness. The learned trial Court on the basis of evidence led by the parties returned a finding that Bhagwan Kaur was the owner of the suit property and, therefore, the plaintiff is entitled to 1/5th share in the suit land as heir of Bhagwan Kaur.

In appeal, a finding was returned on the basis of concession of the counsel for the plaintiff that the property in dispute was inherited by Ishar Singh brother of Hari Singh-defendant No.5 from his father. Ishar Singh sold his share and purchased the land in U.P. The land was purchased by Hari Singh from Ishar Singh by sale of other land. It is also admitted before the First Appellate Court that Bhagwan Kaur had no independent source of income of her own. On the basis of such facts, a finding was returned that Bhagwan Kaur was infact a Benami owner and Hari Singh was the real owner of the land in dispute and thus competent to alienate the property. For the reference, the findings recorded in the judgment of the First Appellate Court reads as under:

"It is not disputed before me that the land in question was sold by Ishar Singh, brother of Hari Singh and it was repurchased by Hari Singh by sale of the other land. It is also not disputed that this property was inherited from the father of Hari Singh defendant No.5 and after

selling his share Ishar Singh, purchased the land in U.P. and had started residing over there. In this manner, this was the ancestral land of Hari Singh which he is alleged to have re-acquired with the sale proceeds of the other land, which is not disputed.

It is admitted by the plaintiff himself as PW1 that Hari Singh, Bhagwan Kaur and all their sons have living together, and they had good relations inter se. It is also admitted that Bhagwan Kaur had no independent source of income of her own."

Jagdev Singh-plaintiff alone has disputed the alienation effected by Hari Singh in the suit. The appellant has pleaded in para 8 of the plaint itself that he has asked defendants No.6 to 8 to join the plaintiff in filing the suit but they have refused to do so. In fact Hari Singh and defendants No.6 and 7 Tirath Singh and Dalbir Singh have asserted that in fact Bhagwan Kaur was a Benami owner and the real owner was Hari Singh but still the plaintiff has joined such defendants as the appellants in the present appeal. Therefore, the appeal on behalf of appellants No.2 to 6 would not be maintainable as they have not joined the plaintiff before the trial Court and the trial Court has not granted any decree in their favour as well.

Even if the appeal is held to be maintainable by all the appellants, I do not find any illegality and irregularity in the findings recorded by the First Appellate Court.

The learned counsel for the appellants has vehemently argued that neither Hari Singh nor defendants No.6 and 7, who pleaded that Bhagwan Kaur was the Benami owner, have stepped into the witness box, therefore, issue No.3 was required to be decided against the said defendants

and in favour of the plaintiff. As a matter of fact, issue No.3 is counter to issue No.1. The plaintiff has examined himself as the sole witness. He has admitted that Bhagwan Kaur had no source of income. The defendants-vendees had produced witness to prove the fact that it was Hari Singh, who was the real owner. The concession recorded before the First Appellate Court shows that in fact the land was owned by one Ishar Singh and it was purchased by Hari Singh after selling some other land. In the absence of any proof of means of purchase of the land By Bhagwan Kaur, the findings recorded by the First Appellate Court that in fact Bhagwan Kaur was Benami owner cannot be said to be a finding without evidence. It is for the plaintiff to prove the ownership of Bhagwan Kaur in first instance. The plaintiff has failed to discharge such onus.

It may be noticed that the plea of Benami raised in the suit is prior to commencement of Benami Transactions (Prohibition) Act, 1988. Therefore, the plaintiff has failed to prove that Bhagwan Kaur was the real owner of the property in dispute. Since the plaintiff has failed to prove that Bhagwan Kaur was the real owner, Hari Singh as the real owner could very well effect the sale and, therefore, sale effected by him cannot be said to be found to be void in any manner.

The arguments raised by the learned counsel for the appellants that the concession recorded being not arising out of the facts on record, is immaterial, as such the appellants cannot be permitted to dispute such concession in the present appeal as the appellants have failed to dispute such concession recorded in the judgment and decree in the memo of appeal. Even otherwise, such concession recorded in the judgment could be

disputed only by moving an appropriate application before the Court, who has recorded such concession.

Consequently, I do not find any substantial questions of law arises for consideration of this Court in second appeal. Only findings of fact are sought to be disputed by re-appreciation of evidence, which is not permissible.

Dismissed.

(HEMANT GUPTA)
JUDGE

July 18, 2007
jt